

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:

**FRIM ISLAND, LLC,
TIM SHUMAKER, and
RONNIE DILLARD**

RESPONDENTS

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**DIVISION OF WATER
POLLUTION CONTROL**

CASE NUMBER WPC 07-0122

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed director of the Division of Water Pollution Control (hereinafter the "director" and the "division" respectively) by the commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "commissioner" and the "department" respectively).

II.

Frim Island, LLC (hereinafter "Respondent Frim Island"), is an active limited liability registered in the state of Georgia and is the owner of property located on Chanceytown Road, Polk County, Tennessee (hereinafter "the site"). Service of process may be made on Respondent Frim Island through Mr. Randy Wells, Registered Agent, at 11675 Rainwater Drive, Alpharetta, Georgia 30004.

III.

Tim Shumaker (hereinafter “Respondent Shumaker”), is the president of Frim Island, LLC. Service of process may be made on Respondent Shumaker at 1180 Temple Johnson Road, Logansville, Georgia 30052.

IV.

Ronnie Dillard (hereinafter “Respondent Dillard”), is a resident of Tennessee and is known to be an operator at the site. Service of process may be made on Respondent Dillard at P.O. Box 953, Ducktown, Tennessee 37326.

JURISDICTION

V.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act, (the “Act”) has occurred, or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

VI.

The Respondents are “persons” as defined by T.C.A. § 69-3-103(20) and as herein described, the Respondents have violated the Act.

VII.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (TNCGP) may be obtained by submittal of a Notice of Intent (NOI). Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

VIII.

Brush Creek and the unnamed tributaries to Brush Creek are “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: domestic water supply, industrial water supply, fish and aquatic life, recreation, livestock

watering and wildlife and irrigation. Additionally, Brush Creek and the unnamed tributaries are designated high quality waters based on inclusion in the Cherokee National Forest.

FACTS

IX.

On April 26, 2007, division personnel conducted a complaint investigation at the site and noted construction activities greater than one acre in area were underway. Inadequate Erosion Prevention and Sediment Control (EPSC) measures had allowed eroded material to migrate into Brush Creek and an unnamed tributary to Brush Creek, causing numerous areas of sediment deposition several inches in depth. A minor road crossing had been constructed over Brush Creek and inadequate EPSC measures at the crossing were allowing eroded material to migrate into Brush Creek. Additionally, division personnel noted that two dams and impoundments had been constructed on a second unnamed tributary to Brush Creek, causing eroded material to migrate into the unnamed tributary and also causing a loss of flow downstream of the two dams and impoundments. A file review indicated that coverage under the TNCGP and ARAP authorization had not been issued for these activities.

X.

On April 27, 2007, the division issued a Notice of Violation (NOV) to Respondents Frim Island and Shumaker for the violations observed during the April 26, 2007, complaint investigation. The NOV instructed the Respondents to install EPSC measures to prevent additional eroded material from entering waters of the state and submit a NOI and a Storm Water Pollution Prevention Plan (SWPPP) and obtain coverage under the TNCGP. These actions were to be completed within fourteen days of receipt of the NOV.

XI.

On May 4, 2007, division personnel met Respondent Shumaker and his representative to discuss the NOV and site conditions. Respondent Shumaker requested an extension of forty five days to submit a NOI and SWPPP, stating this would be the amount of time required to complete the necessary survey of the site. The division agreed to this extension based on the size of the site.

XII.

On May 30, 2007, division personnel conducted a site visit to assess the impacts that construction and unauthorized ARAP activities were causing to Brush Creek and the unnamed tributaries to Brush Creek. Division personnel noted some improvement in the EPSC measures at the site compared to the April 26, 2007 site visit.

XIII.

On June 6 and June 14, 2007, division personnel returned to the site to complete the assessment of Brush Creek and the unnamed tributaries to Brush Creek, determining that extensive sediment deposits from construction activities were present within Brush Creek and the unnamed tributaries for a total of approximately fifteen hundred feet. Division personnel noted continued attempts at site stabilization.

XIV.

On June 22, 2007, the division received a NOI and SWPPP for construction activities at the site. Respondent Shumaker signed the NOI as owner/developer and Respondent Dillard signed the NOI as primary contractor. The SWPPP was determined to be deficient based on site

conditions observed during the April 26, 2007 and May 4, 2007 site visits and the June 6, 2007 site visit. To date, coverage under the TNCGP has not been issued.

XV.

On June 25, 2007, the division received an ARAP application and fee from Respondent Shumaker, requesting written authorization for the impoundment activities. The review of this application was not conducted and the fee was returned due to the fact that the alterations had already been conducted.

XVI.

During the course of investigating the Respondent's activities, the division incurred damages in the amount of ONE THOUSAND FOUR HUNDRED ELEVEN DOLLARS AND SIXTY FOUR CENTS (\$1,411.64).

VIOLATIONS

XVII.

By altering waters of the state without authorization under an ARAP and conducting land disturbance activities without coverage under the TNCGP, the Respondents have violated T.C.A.

§§ 69-3-108(a)–(b), 114(b), which state in part:

§ 69-3-108(a):

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XVIII.

By constructing a dam across and impounding the Brush Creek tributary in two locations, the Respondents have caused flow in the Brush Creek tributary to be significantly reduced downstream of the dams and impoundments, altering the physical, chemical and biological properties of waters of the state. Therefore, the Respondent has violated T.C.A. Sections 69-3-108(b) and 69-3-114(b) as referenced above.

XIX.

By discharging materials or wastewater without coverage under a storm water NPDES permit, the Respondents have violated T.C.A. Sections 69-3-108(a) and 69-3-114(b) as referenced above.

XX.

By failing to properly install and maintain EPSC measures at a land disturbance site, the activity described herein did or was likely to cause an increase in the discharge of wastes into the waters of the state. Therefore, the Respondents have violated T.C.A. Sections 69-3-108(b) and 69-3-114(b) as referenced above.

XXI.

By causing a condition of pollution to Brush Creek and the unnamed tributaries to Brush Creek, the Respondents have violated T. C. A. Section 69-3-114(a).

T.C.A. § 69-3-114(a) states:

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XXII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER AND ASSESSMENT to the Respondents.

1. The Respondents shall, immediately establish and maintain effective EPSC measures on-site such that sediment is not allowed to leave the site or enter waters of the state. These EPSC measures shall be maintained until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established. The Respondents shall, within 14 days of receipt of this ORDER, submit written documentation and photographic evidence indicating that appropriate EPSC measures are in place. The Respondents shall submit this written documentation and photographic evidence to the Water Pollution Control Manager in the Chattanooga-Environmental Field Office (CH-EFO) at Suite 550 – State Office Building, 540 McCallie Avenue, Chattanooga, Tennessee 37402, and shall submit a copy of the written documentation and photographic evidence to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.

2. The Respondents shall, within 30 days of receipt of this Order, submit a NOI, SWPPP and the appropriate application fee for all remaining construction activities at the site. These documents and the application fee should be submitted to the Water Pollution Control Manager in the CH-EFO as shown in Item 1, above.
3. The Respondents shall, within 60 days of receipt of this ORDER, submit to the division a corrective action plan (CAP) to remove the accumulated sediment from the affected areas downstream of the dams and impoundments, de-water the impoundments, remove accumulated sediment from areas within the de-watered impoundments upstream of the dams, dismantle the dams and restore the affected areas of the watershed downstream and upstream of the dams and impoundments to pre-construction conditions. The CAP shall include a biological and morphological assessment of the restored watershed, a component for vegetation monitoring and, in the event of mortality, vegetation replacement and a component for stream monitoring for five years. The CAP shall be prepared by a licensed professional engineer, landscape architect, or other competent professional and shall detail the manual methods to be used to remove the accumulated sediment from the affected areas downstream of the dams and impoundments prior to de-watering and to remove the accumulated sediment from within the de-watered impoundments prior to dismantling the dams. The CAP shall detail the proposed method to be used to de-water the impoundments in a manner that will not result in further violations of the Act. The Respondents shall submit the CAP to the CH-EFO for review and approval and shall submit a copy of the CAP to the E&C Section, at the respective addresses shown in item 1, above. The Respondents must correct any deficiencies the

division finds upon review of the CAP and the corrected CAP should be resubmitted to the division within 30 days of notification of the deficiencies.

4. The Respondents shall, within 30 days of receipt of written approval, initiate the approved actions. The written approval of the CAP by the division will constitute authorization for sediment removal from the affected areas downstream of the dams and impoundments, as well as authorization for restoration of the affected areas of the watershed upstream of the dams and impoundments and no additional ARAP coverage is required. The Respondents shall submit written notification to the division that work has begun at the time the Respondents initiates the CAP. The Respondents shall submit the written notification to the CH-EFO and shall submit a copy of the written notification to the E&C Section, at the respective addresses shown in item 1, above.
5. The Respondents shall, within 365 days of initiating the approved CAP, but not later than July 31, 2008, complete the CAP and submit written notification of completion to the division. The Respondents shall submit the written notification to the CH-EFO and shall submit a copy of the written notification to the E&C Section, at the respective addresses shown in item 1, above.
6. The Respondents shall, within six months of receipt of this Order and Assessment, attend a Fundamentals of Erosion and Sediment Control Workshop provided by the Tennessee Department of Environment and Conservation, and submit documentation of successful completion to the CH-EFO and a copy to the E&C Section, at the respective addresses above. The Respondents should obtain certification for all supervisory personnel who are expected to be responsible for land disturbance activities or erosion prevention and

sediment control at the site. Information may be found on the program website at <http://www.tnepsc.org/>.

7. The Respondents shall pay DAMAGES to the division in the amount of ONE THOUSAND FOUR HUNDRED ELEVEN DOLLARS AND SIXTY FOUR CENTS (\$1,411.64).
8. The Respondents shall pay a CIVIL PENALTY of SEVENTY THOUSAND DOLLARS (\$70,000.00) to the division, hereby ASSESSED to be paid as follows:
 - a. The Respondents shall, within 30 days of receipt of this ORDER, pay a CIVIL PENALTY in the amount of TWENTY THOUSAND DOLLARS (\$20,000.00).
 - b. If the Respondents fail to comply with Part XXIII, item 1 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWELVE THOUSAND DOLLARS (\$12,000.00), payable within 30 days of default.
 - c. If the Respondents fail to comply with Part XXIII, item 2 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of EIGHT THOUSAND DOLLARS (\$8,000.00), payable within 30 days of default.
 - d. If the Respondents fail to comply with Part XXIII, item 3 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of EIGHT THOUSAND DOLLARS (\$8,000.00), payable within 30 days of default.
 - e. If the Respondents fail to comply with Part XXIII, item 4 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of EIGHT THOUSAND DOLLARS (\$8,000.00), payable within 30 days of default.

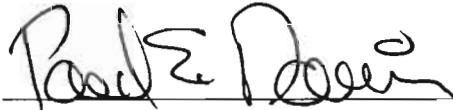
- f. If the Respondents fail to comply with Part XXIII, item 5 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TEN THOUSAND DOLLARS (\$10,000.00), payable within 30 days of default.
- g. If the Respondents fail to comply with Part XXIII, item 6 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.

The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The Director may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for this time extension, the Respondents shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondents are advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondents in the future.

Issued by the director of the Division of Water Pollution Control on behalf of the commissioner of the Tennessee Department of Environment and Conservation on this 3/st day of July 2007.

A handwritten signature in black ink, appearing to read "Paul E. Davis", is written over a horizontal line.

Paul E. Davis, P.E.

Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109 and 69-3-115, allows any Respondent to secure review of this ORDER AND ASSESSMENT. To secure review of this ORDER AND ASSESSMENT, the Respondent must file with the director at the address below a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondents must file the written petition within thirty (30) days of receiving this ORDER AND ASSESSMENT.

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a

trial before the Board sitting with an Administrative Law Judge. The Respondents may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Unit, Tennessee Department of Environment and Conservation, 14th Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.